In the Supreme Court of the United States

OCTOBER TERM, 1971

No. A-746

71-1017

MIKE GRAVEL,
PETITIONER,
v.
UNITED STATES,
RESPONDENT.

BRIEF OF UNITARIAN UNIVERSALIST ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Interest of Amicus

This brief in support of the petition for certiorari is filed with the consent of the parties;[1] it is submitted because, as will appear, the amicus has a direct and substantial interest in the outcome of this litigation. Nonetheless, the amicus recognizes that at this stage briefs by amicii are not favored. Accordingly, the amicus will make its points with as much economy as possible, and

[1] The letters of assent have been filed with the clerk of the court, copies thereof appear at the end of this brief.

it will not burden this court with a repetition of matters comprehensively treated in the petition.

The Unitarian Universalist Association is a religious association established more than 200 years ago and incorporated under the laws of The Commonwealth of Massachusetts. Beacon Press is a division of the association and is subject to its direction and control. In its opinion of January 7, 1972, the court of appeals said:

> "We would hold, if this appeal can be thought to raise that question, that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to [Senator Gravel] or others in connection with the [Pentagon] Papers subsequent to their introduction into the subcommittee records." (Op. at 12-13)

Thereafter, on January 11, 1972, the government served a grand jury subpoena on Gobin Stair, the Director of Beacon Press and a second subpoena on him or the custodian of the records calling for the production of all Beacon records pertaining to the Pentagon Papers publication. While these subpoenas have been withdrawn, the government, in papers filed in *Unitarian Universalist Association* v. *Joseph L. Tauro,* et al, (D. Mass., No. 72-136-C), a related proceeding, specified that "... identification of the participants in the transaction whereby the 'Pentagon Papers' were obtained and published by Beacon Press *is* sought, along with the details of such transactions." The interest of the amicus is, therefore, evident.[2]

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[2] To be sure, the court of appeals subsequently noted that the amicus was not bound by the language in the opinion since Beacon Press was not a party to the case. While technically accurate, of course, the court's response is unconvincing. It is evident that the court's language reflects its considered judgment and would be adhered to in any further proceeding.

Reasons for Granting the Writ.

After concluding that the speech and debate clause[3] necessarily insulated petitioner from any inquiry into his publication and prepublication activity concerning the Pentagon Papers, the court of appeals held that the clause: (1) Did not prohibit grand jury inquiry into petitioner's subsequent private publication of the papers through Beacon Press, although *deus ex machina* the court *tentatively* accorded him a common law privilege against further interrogation (but not necessarily criminal liability) on that matter (Op. pp. 10-11). (2) Did not prohibit interrogation of third persons except where the "object [of the inquiry] is to attack the legislator's motives in speaking" (Op. p. 12). As we shall show, each holding is erroneous. And their manifest importance,[4] centering as they do upon important prerogatives of members of congress, provides ample warrant for plenary consideration by this court. *Powell* v. *McCormack*, 395 U.S. 486.

I. *Private Publication.*

The court of appeals recognized that the protection afforded by the speech and debate clause extends beyond simply insulating petitioner from inquiry concerning any documents he introduced into congress. At least since *Kilbourn* v. *Thompson*, 103 U.S. 168, 204, it has been settled that the protection of the clause extends to all "things generally done . . . in relation to the business before [congress]." See also *Powell* v. *McCormack, supra*, at 501-

[3] "[F]or any Speech or Debate they [Senators and Representatives] shall not be questioned in any other place." U.C. Const. art. 1; § 6.

[4] The court of appeals had no doubt of the importance of the issues before it. It explicitly recognized the importance of the case both in the opening sentence of its opinion of January 7 as well as in its petition denying the motion for rehearing.

506. Nonetheless, despite *Kilbourn* and this court's admonition in *United States* v. *Johnson*, 383 U.S. 169, 179, that "the privilege should be read broadly," the court of appeals gave the clause an extremely restricted scope. The clause, it said, protects only *one* category of "things generally done" in congress; namely, things "generally done" in relation to congressional deliberations. "Our courts," said Judge Aldrich, "have expanded the privilege beyond the act of debating within congress . . . only when necessary to prevent indirect impairment of such deliberations" (Op. p. 9). This view of the clause, in turn, led the court to reject petitioner's claim that his private publication of speeches made in or documents submitted to congress is protected.

The court of appeals was wrong in concluding that petitioner's private publication was not protected, *even assuming its narrow conception of the clause*. What is more, such a restrictive reading of the clause is inconsistent with its history and purpose, as well as the decisions of this court.

1. The court of appeals nowhere purports to demonstrate why the subsequent private publication of documents introduced into congress is not, in the court's language, "necessary to prevent indirect impairment of [congressional] deliberations." The court simply assumes that private publication will not have any effect on *future* congressional deliberations. That assumption is, on its face, highly vulnerable; congress is, after all, an ongoing body, and it would seem apparent that private publication by a legislator represents one method of affecting future congressional deliberations. But the difficulty with the court's assumption is much more basic. The court's willingness to make *any* assumption about the effect of private publication on future congressional deliberations requires a degree of judicial superintendence of the legislative pro-

cess which is wholly at odds with the doctrine of separation of power. It is for congress, not the court of appeals, to determine whether a senator's private publication of congressional documents will further future congressional deliberations.[5]

2. It is interesting to observe that the court nowhere denies that private publication can aid future congressional deliberations. Rather, the court simply opines that such a claim "proves too much," because it would extend the protection of the clause to any speech made outside congress, at least if it had been previously delivered in congress. That possibility is brushed aside with the observation that "we do not believe [petitioner] has struck gold in a field previously thought to be barren". (Op. p. 10). We would have supposed that more than an *ipse dixit* was required to dispose of petitioner's claim. Moreover, the court of appeals never considered whether, given the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open" (*New York Times* v. *Sullivan*, 376 U.S. 254, 270), this court's holding in *Barr* v. *Mateo*, 360 U.S. 564,[6] would call for protection of speeches repeated outside of congress, entirely apart from the strictures of the speech and debate clause.

3. The infirmity in the court of appeals' position is further demonstrated by its concessions. It conceded that some kinds of private publications were protected by the clause: petitioner could claim protection with respect to "republication such as in the news media or the congres-

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[5] See *United States* v. *Johnson*, *supra*, 383 U.S. at 185, where the court recognized that the question of the reach of the speech and debate clause would have been substantially affected by a congressional judgment that certain conduct was *not* protected by the clause.

[6] In *Barr* v. *Mateo*, this court held that, in a libel action, the utterances of a federal official were absolutely privileged so long as they were made "within the outer perimeter" of his official duties.

sional record, which is the *natural consequence of a speech* and is necessarily protected" (Op. p. 8).[7] Surely the conclusion that one category of subsequent publication — by newspaper — is a "natural consequence" of speech, but that other closely similar categories of publication — by book, etc. — are not, is wholly question begging, particularly so given the court's further concession that, in fact, the latter type of publication "may be customarily done by members of Congress" (Op. p. 9). If congressmen customarily engage in the private publication of their speeches why is that not a "natural consequence" of their speech?

In denying the petition for rehearing, the court of appeals sought to escape the foregoing difficulties by yet another formulation. The court suggested a distinction—

> "between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified documents through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern." (Op. on reh. p. 3)

This shift in analysis is striking. What is "customary" publication now becomes a function of a judicial determination of what is relevant to a congressional subcommittee, not whether the publication is done "privately." Plainly, any judicial assessment of what is "relevant" to a congressional committee intrudes a court far into the legislative process itself — an intrusion which, we believe, is in manifest conflict with time-sanctioned principles of separation of powers. Not only is this difficulty ignored by the court of appeals, its new analysis is ad-

[7] Emphasis added.

vanced without even a glancing reference to its earlier conclusion that the "privilege protects against a claim of irrelevancy" (Op. p. 6).

4. Underlying these difficulties is the court's effort to confine the speech and debate clause to its narrowest historical setting. Like its predecessors in the English Bill of Rights and in the Articles of Confederation and in the state constitutions, the clause specifically prohibits executive sanctions for speeches made in the legislature. But, like the other provisions in a document "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs," (*McCulloch* v. *Maryland*, 4 Wheat. 316, 415) the clause has a breadth and meaning which transcends the specific events which gave it birth. See *Powell* v. *McCormack*, 395 U.S. 486, 506. The clause reflects fundamental principles concerning the appropriate distribution of power among the three branches of government. Accordingly, the clause must be "recognized as an important protection of the independence and integrity of the legislature." *United States* v. *Johnson*, 383 U.S. at 178. Not surprisingly, therefore, "the language of the Constitution is framed in the broadest terms," and it is to be "read broadly" (Id. at 179, 182-183). This, in turn, means that the clause "cannot remain static if it is to remain meaningful."[8] To some degree, the precise contours of the clause are shaped by what is appropriately and "customarily" done in the mo-

[8] "In its application, it must be geared to the realities of the manner in which a modern legislative system operates. It cannot afford to be permanently attached to the ways in which legislatures discharged their responsibilities when the Republic was founded, or for that matter, even fifty years ago. . . . Modern legislatures have had to adopt [sic] their techniques of operation to the increasingly complex society within which they must function. New techniques and new methods of procedure have gradually evolved. The doctrine of legislative privilege cannot remain static if it is to remain meaningful." Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate*, 2 Suffolk U.L.R. 34 (1968).

dern legislative process. Contemporary legislative practice, not seventeenth and eighteenth century history, measures what is "generally done . . . in relation to the business before [congress]."

5. The court's effort to confine the speech and debate clause to its narrowest historical setting shows, moreover, that, on this occasion, the court was a bad historian. The speech and debate clause was adopted by the constitutional convention "without discussion and without opposition" largely because it was a familiar one, having existed in the Declaration of Rights, the Articles of Confederation and in various state constitutions. *United States* v. *Johnson*, *supra*, at 177. Plainly, therefore, the general import of the clause, if not all its details, was understood by members of the constitutional convention. And it seems clear that the clause's admittedly spare language was understood by them to protect not only a legislator's free and untrammeled participation in the legislative process, but also his duty to contribute to an enlightened electorate. Thus both the New Hampshire Constitution of 1784 and the Massachusetts Constitution of 1780 explicitly tied the protection of their clauses to that of the "rights of the people."[9] See also *Tenney* v. *Brandhove*, 341 U.S. 367, 377 n.6. The court below failed to appreciate that the speech and debate clause "performs an important function in representative government." *Powell* v. *McCormack*, *supra*, at 503. And representative government presupposes that a legislator may communicate

[9] See, e.g., Mass. Const. art. XXI (1780). "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." N.H. Const. pt. 1 art. XXX (1784). "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever."

with his constituents and the country at large, as well as with his colleagues. The only checks on this legislative prerogative stem from the political process, not from the executive or judicial departments — a result which is, of course, entirely consistent with the underlying assumptions of our polity. Cf. *Munn* v. *Illinois*, 94 U.S. 133, 134.

6. Finally, even assuming the court of appeals' reading of history, we think it evident that the clause protects petitioner's private publication of the Pentagon Papers. For we have here little more than ancient problems in a twentieth century context: the executive still seeks to intimidate and discipline members of the legislature for conduct which casts aspersion upon the executive's handling of a matter of overriding national interest. The only difference between this effort and that of earlier times is that techniques more appropriate to our age, interrogation, harassment and exposure, have been substituted for the ancient devices of arrest and imprisonment.[10]

II. *Third Party Protection.*

A

The court of appeals restricted the protection of the clause in another significant manner. Inquiry of third parties was not barred by the clause unless (citing *Johnson*) "the object [of the inquiry] is to attack the legislator's motives in speaking" (Op. p. 12):

> "With respect to third persons, provided that the principles of *Johnson* are observed, we can see no reason for them to be free of inquiry as to their own

[10] It is well worth noting here that the court below did not in fact rule out criminal prosecution for petitioner. (Op. pp. 10-11.)

> conduct regarding the Pentagon Papers, including their dealing with the intervenor or his aides . . . [we] hold that no immunity was conferred upon Beacon Press simply because, if he did, intervenor delivered the Papers to it for private publication.[11]

The importance of this holding cannot be underestimated. It is evident that any legislator will and must frequently act in cooperation with or through private parties in the discharge of his functions. Simply put, this is a necessary and "customary" aspect of the functioning of the legislative process in the twentieth century. Accordingly, even the narrow protection afforded by the clause to petitioner under the holding of the court of appeals is illusory: where the clause shields a legislator from direct inquiry, his conduct still can be inquired of through interrogation of the third parties with whom he dealt. But, surely, "[i]ntimidation . . . harassment, embarrassment" of a legislator (Op. p. 6) can be accomplished by either form of inquiry. The only difference is the point at which the executive pressure is laid, not in end result. And the end result of allowing unlimited inquiry of third parties necessarily must be either to intimidate the legislator in the discharge of his constitutional functions, and/or to intimidate those private persons with whom he would deal.

The court of appeals, however, thought that petitioner's rights are adequately secured so long as third party inquiry is prohibited where its "object is to attack the legislator's

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[11] The court of appeals added:

"Indeed, we would hold, if his appeal can be thought to raise that question, that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to intervenor or others in connection with the Papers subsequent to their introduction into the subcommittee records. Payment for delivering a copy, by a post-speech agreement, is not comparable to a payment for initially delivering the speech. . . ."

motives in speaking" (Op. p. 12). It is difficult to see what relevance the court thought that this limitation had in this case since petitioner's third party contacts occurred after he placed the Pentagon Papers before Congress. More fundamentally, however, in the context of this problem (compare *United States* v. *Johnson*, *supra*) the suggested standard lacks content. By what criteria could a court determine whether "the object" of a grand jury interrogation of Beacon Press concerning petitioner's publication of the Pentagon Papers was to "attack" petitioner's motives in speaking? Finally, we are at a loss in understanding why the protection of the clause should depend upon "the object" of the interrogator? The injury done to the legislator in no significant way depends upon a resolution of that elusive element.

B

The petition for certiorari demonstrates that there is authority recognizing protection for third parties for private publication of legislative speeches. See, e.g., *Wason* v. *Walter*, L.R. 4 Q.B. 73 (1868). See also *Doe* v. *McMillan*, — F.2d — (D.C. Cir. 1972), 40 L.W. 2471, expressly recognizing that the clause protects not only members of congress but federal employees assisting them in publishing a congressional committee report. We submit that there are no relevant differences between Beacon Press and the federal employees in *McMillan*, particularly once it is conceded that private publication by members of Congress is "customary." Moreover, even if Beacon Press could not invoke the protection of the speech and debate clause, the court of appeals nowhere explains why it would not be protected by a "common law privilege" such as the court tentatively accorded to petitioner. In *Doe* v. *McMillan*, *supra*, the court of appeals recognized such a privilege for

officials of the District of Columbia who supplied information to the congressional committee.

This court has never definitively resolved the extent to which the speech and debate clause, or some other privilege, protects third parties,[12] in either of two distinct situations: *first,* with respect to their legal accountability for action taken in conjunction with members of Congress, an issue which, of course, is not raised here; *second,* and of grave importance here, the extent to which third parties can be interrogated concerning their dealings with a member of Congress, the direct inquiry of whom could not be undertaken. That the questions of legal accountability and of interrogation are quite distinct was fully appreciated by the court below (Op. p. 10).

Kilbourn v. *Thompson, supra,* and its progeny are not dispositive of the latter question. In *Kilbourn* members of Congress were held protected by the clause, but the congressional marshals were held responsible in damages for the execution of an unconstitutional legislative arrest order. See also *Dombrowski* v. *Eastland,* 387 U.S. 82; *Powell* v. *McCormack,* 395 U.S. 486, 501-506. Thus in *Kilbourn,* the clause operated so as to protect legislators, but not third parties, from the consequences of *unconstitutional* action which deprived citizens of rights secured to them by the constitution of the United States. See *Powell* v. *McCormack, supra,* at 503-504. Here, by contrast, there is no claim that any citizen's constitutionally protected liberty has been abridged by the tortious conduct of third parties. Moreover, here, unlike *Kilbourn,* petitioner's conduct was constitutionally protected activity, and Beacon Press simply assisted petitioner in the exercise of his constitutional prerogative. And finally, here the crucial question raised by the petition is not the legal accountability

[12] Either directly, or derivately through their association with a member of congress.

of Beacon Press (e.g., in a criminal case) for its conduct,[13] but whether it can be *interrogated* about its dealings with petitioner in circumstances where he cannot be interrogated. *Kilbourn* is not even remotely relevant to that question.

In closing, we would observe that Beacon Press is in a sensitive and unfortunate position in view of the court of appeals' ruling. It is under an obligation to petitioner, a United States Senator, not to violate his privilege. Yet, unless this court acts, it may soon be under a judicial order to do just that.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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[13] We, of course, do not concede that criminal sanctions could validly be imposed for that conduct.

CERTIFICATE OF SERVICE

In accordance with Rule 33, I hereby certify that I have made service of three copies of the Brief Of The Amicus Curiae In Support Of The Petition For Certiorari on all counsel of record as follows: Solicitor General, Department of Justice, Washington, D.C.; Counsel for United States by personally delivering three copies to his place of business; Charles Fishman, Esquire, counsel for petitioner by delivering three copies to his business office; and Harvey Silvergate, Esquire, counsel for respondent, by causing three copies to be delivered by hand to his business office.

FRANK B. FREDERICK

OFFICE OF THE SOLICITOR GENERAL
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[SEAL]

January 28, 1972

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Re: Mike Gravel, U.S. Senator v.
United States, No.
October Term, 1971

Dear Mr. Frederick,

In response to the request in your letter of January 26, 1972, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of The Unitarian Universalist Association.

Very truly yours,

(s) ERWIN N. GRISWOLD
ERWIN N. GRISWOLD
Solicitor General

MIKE GRAVEL
ALASKA

UNITED STATES SENATE
WASHINGTON, D.C. 20510

January 28, 1972

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(s) CHARLES L. FISHMAN
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Senator Mike Gravel